No. 87-645

In the Supreme Court of the United States

OCTOBER TERM, 1987

F. CLARK HUFFMAN, ET AL., PETITIONERS

v.

WESTERN NUCLEAR, INC., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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TABLE OF AUTHORITIES

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In our opening brief, we demonstrated that the court of appeals' interpretation of Section 161(v) of the Atomic Energy Act of 1954, 42 U.S.C. 2201(v), cannot be squared with the language, purpose and history of that provision. The court of appeals took a statute that requires the Department of Energy (DOE) to restrict enrichment of foreign uranium for a stated purpose – "to assure the maintenance of a viable domestic uranium industry" (*ibid.*) – and converted it into a blanket command that "if the domestic uranium industry is not viable, the DOE must restrict enrichment of foreign uranium" (Pet. App. 20a). Try as they may, respondents have failed to rehabilitate this remarkable transformation. Section 2201(v) states its purpose in plain terms and does not require enrichment restrictions that would not serve that purpose.[1]

[1] Respondents mischaracterize our position as the claim that "as a result of changed circumstances, compliance with the statute would not achieve the statutory goal" (Br. 2-3). Amici States (*e.g.*, Br. 18)

1. a. Respondents' principal argument is that Section 2201(v) should be read as incorporating an implicit finding of fact to the effect that restrictions on enrichment of foreign uranium will *always* assure the maintenance of a viable domestic uranium industry. See, *e.g.*, Resp. Br. 2 ("Section [2201(v)] embodies a congressional determination that restrictions on enrichment of low-cost foreign uranium would accomplish the statutory goal * * *."); see also *id.* at 15, 18, 19-20, 25. Congress of course *could* have made such a finding, and *could* have written it into the statute. But the plain language of the statute reveals that Congress did no such thing. Congress directed DOE to adopt a particular means (restrictions on enrichment of foreign uranium) "to the extent necessary to assure" a particular end (a viable domestic uranium industry). It did not declare, as a matter of law, that the means *always* would produce that end, no matter what the facts or circumstances might be in the future. Respondents can point to nothing in the statute that even resembles such a factual finding.

Nor does the legislative history suggest that Congress intended to enact any factual finding directly into law. The Joint Committee on Atomic Energy emphasized (S. Rep. 1325, 88th Cong., 2d Sess. 19 (1964) [hereinafter *Private Ownership Act Report*]) that "[t]he future holds many uncertainties" and that "many unforeseeable developments may arise in this field." Mindful of these contingencies, the Committee drafted a bill that would "permit the Commission to survey periodically the condition of the domestic and world uranium markets and to offer or refuse to offer its enrichment services on a basis which will assure, in its opinion, the maintenance of a viable domestic uranium industry" (*id.* at 31). It would be most peculiar for a Committee so concerned about future uncertainties and the need for regulatory flexibility to turn around and enact into law its understanding of the then-contemporary condition of the domestic and world uranium markets. Moreover, there would be no point in enacting such a statute, when Congress could just as easily enact a statute that would impose restrictions only when this would fulfill the statutory purpose—the maintenance of a viable domestic uranium industry. Respondents never explain why Congress would deliberately choose to pass a statute that would become irrational over time, rather than one that is capable of adapting to changing circumstances.[2]

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and Senators (Br. 3-4) make similar assertions. As we have explained (Pet. 21 n.14, 27-28; Br. 34 n.24), however, the dispute in this case is about the meaning of the statute, not whether the Secretary has the discretion to ignore it. We maintain that Section 2201(v) imposes a mandatory duty on the Secretary to restrict enrichment of foreign uranium when this is necessary to assure the viability of the domestic uranium industry, but it does not impose any duty on the Secretary to take actions that would not achieve its goal.

[2] Respondents' argument rests on the assumption that Congress did not foresee the day when enrichment restrictions would lose their effectiveness because of competition from other suppliers of enrichment services. Respondents' confident assertion (Br. 25 n.35) that Congress did not foresee the possible demise of DOE's monopoly in enrichment services, however, is unwarranted. In fact, as both respondents (Br. 27 n.37) and we (Gov't Br. 29 n.21) have noted, in the process of considering the Private Ownership Act, the Joint Committee on Atomic Energy questioned the General Counsel of the Atomic Energy Commisson (AEC) on the effectiveness of enrichment restrictions in the face of potential foreign competition in the market for enrichment services from Great Britain. *Private Ownership of Special Nuclear Materials: Hearings Before the Subcomm. on Legislation of the Joint Comm. on Atomic Energy*, 88th Cong., 1st Sess. 30 (1963). In addition, at the 1964 hearings Chairman Seaborg, in response to questions from the Joint Committee, stated (*Private Ownership of Special Nuclear Materials: Hearings Before the Subcomm. on Legislation of the Joint Comm. on Atomic Energy*, 88th Cong., 2d Sess. 339-340) that other countries might begin selling enriched uranium to American users in the late 1970s.

Respondents' notion that statutes incorporate the factual assumptions that may have given rise to their enactment finds no support in this Court's cases. See, *e.g.*, *Diamond* v. *Chakrabarty*, 447 U.S. 303 (1980); *Fortnightly Corp.* v. *United States*, 392 U.S. 390, 395-396 (1968); *Browder* v. *United States*, 312 U.S. 335, 339-340 (1941). In *Diamond*, for example, the Court held that a micro-organism was patentable, even though the Plant Patent Act of 1930 had been enacted on the assumption that living things were not patentable (447 U.S. at 310-311). The Court explained (*id.* at 312-313) that the 1930 Act did not embody the legal conclusion that organisms could not be patented; it merely reflected the belief—universal in 1930 but subseqently proven to be false—that a living organism could not be designed by man. The lesson of *Diamond*—that Congress will not be presumed to have bound itself to the exact conditions that prevailed when a law was enacted—applies even more strongly where, as here, a subject has been committed to an expert agency, which is charged with applying congressional policy to changing circumstances.

b. Respondents also reiterate the argument (Br. 20)—advanced for the first time in their brief in opposition (at 13)—that enrichment restrictions may in fact be necessary to assure viability in the sense that they may be a "necessary" as opposed to a "sufficient" condition of viability.

This appeal to technical notions of necessary and sufficient conditions is unavailing. First, it ignores the "fundamental canon of statutory construction * * * that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin* v. *United States*, 444 U.S. 37, 42 (1979), citing *Burns* v. *Alcala*, 420 U.S. 575, 580-581 (1975). The statute says that restrictions must be "necessary to assure" a viable domestic industry, not that they must be a "necessary but not sufficient condition" of viability. Respondents' argument "would give an unwarranted rigidity to the application of the word 'necessary,' which has always been recognized as a word to be harmonized with its context." *Armour & Co.* v. *Wantock*, 323 U.S. 126, 129-130 (1944), citing *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 413, 414 (1819).

Moreover, under the theory elsewhere advanced by respondents (see Br. 26-29), enrichment restrictions are in fact not a "necessary condition" of viability. As respondents note (*ibid.*), the importation or the domestic transfer of either enriched or unenriched uranium require a license from the Nuclear Regulatory Commission (NRC) (see 42 U.S.C. 2073(a) (enriched uranium); 42 U.S.C. 2092 (unenriched uranium)). Respondents suggest that the NRC's licensing powers could be used to give the domestic uranium industry a complete monopoly in the primary domestic market for uranium and thus to promote the viability of the domestic uranium industry. But if that is true, then restrictions on *enrichment* of foreign uranium under Section 2201(v) would not be a necessary condition of viability, since any contribution such restrictions would make to viability could be made as well or better by other means. If the statute requires that this logic game be played, respondents cannot prevail.

2. In any event, there is no merit to the contention that Section 2201(v) either requires the NRC to impose an embargo on imports of enriched uranium, or requires DOE to impose enrichment restrictions if such restrictions, in combination with an NRC embargo, might make the domestic industry viable.[3] Section 2201(v) refers to one and

[3] It is entirely speculative whether granting the domestic uranium industry even a total monopoly in the primary domestic market would be enough to make the domestic uranium industry profitable; it is

only one tool to assure viability—enrichment restrictions. It requires that a specifically identified means—enrichment restrictions—be used to achieve a particular end—the viability of the domestic industry—and imposes no duty with respect to any other policy measure when the means cannot achieve the end. Possible actions of the NRC, and their possible effects on viability, thus have no bearing on DOE's obligations under Section 2201(v).

This conclusion has nothing to do with the 1974 division of the Atomic Energy Commission (AEC) into DOE and the NRC; contrary to respondents' suggestion (Br. 29), the same result would follow even if all the powers of DOE and the NRC were still centralized in one agency. The Private Ownership of Special Nuclear Materials Act, Pub. L. No. 88-489, 78 Stat. 602 (the Private Ownership Act), authorized the AEC to sell enrichment services. That same Act also authorized the AEC to license imports of enriched

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even more uncertain whether this step would make it "viable" within the meaning of the statute and implementing criteria (see Gov't Br. 40-42). The domestic uranium industry was in serious decline well before uranium imports reached a significant level. See *Status of the Domestic Uranium Mining and Milling Industry: The Effects of Imports: Hearings Before the Subcomm. on Energy Research and Development of the Senate Comm. on Energy and Natural Resources*, 97th Cong., 1st Sess. 12, 16 (1981) (through August of 1981, 5% of ore delivered to DOE for enrichment was of foreign origin) (statement of Shelby Brewer, Assistant Secretary of Energy for Nuclear Energy). Indeed, that decline set in at a time when restrictions on DOE's enrichment of foreign ore had not yet been completely phased out. See 39 Fed. Reg. 38016-38017 (1974) (schedule of phase-out). Moreover, domestic uranium users have accumulated large stockpiles of enriched uranium, and a substantial secondary market has developed (51 Fed. Reg. 3625 (1986)). These factors suggest that the problems of the domestic industry are due to fundamental economic conditions—especially a serious imbalance of supply and demand—not to imports of uranium ore. See 51 Fed. Reg. 27135 (1986).

uranium.[4] The provision of enrichment services was made subject to the proviso at issue in this case. However, the Joint Committee on Atomic Energy specifically *declined* to require that the AEC exercise its licensing power so as to assure the maintenance of a viable domestic uranium industry. Such a proviso was originally included in the legislation proposed by the domestic uranium industry that became Section 2201(v), but was not recommended by the Joint Committee or adopted by Congress. See *Private Ownership of Special Nuclear Materials: Hearings Before the Subcomm. on Legislation of the Joint Comm. on Atomic Energy*, 88th Cong., 2d Sess. 198 (1964) (proposal by Kerr-McGee Co.). Clearly, had Congress wanted enrichment restrictions to be used in conjunction with import restrictions, it would have attached the proviso that appears in Section 2201(v) to the NRC's licensing authority. Congress's refusal to do so cannot be reconciled with respondents' argument.[5]

3. In our opening brief, we explained (at 34-37) that the court of appeals' reading of Section 2201(v) can draw no support from subsequent congressional consideration of enrichment restrictions and uranium import restric-

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[4] Under 42 U.S.C. 2077(c), the AEC (now the NRC) may not "issue a license pursuant to [42 U.S.C. 2073] to any person within the United States if the Commission finds that the * * * issuance of such license would be inimical to the common defense and security or would constitute an unreasonable risk to the health and safety of the public." Section 2077(c) makes no mention of the domestic uranium industry or any economic policy considerations.

[5] Moreover, as we have noted (page 5, *supra*), restrictions on the importation of both enriched and unenriched uranium could provide any relief that could be provided through enrichment restrictions alone. Had Congress wished the agencies to protect the domestic industry with all means and at all costs, as respondents seem to assume, it would have adopted Kerr-McGee's entire proposal.

tions. Indeed, in 1982, in enacting Section 170(b) of the Atomic Energy Act of 1954, 42 U.S.C. 2210(b), Congress specifically rejected relief similar to that sought by respondents.

In an effort to create the contrary impression, respondents suggest that legislators who supported strong measures to protect the domestic uranium industry in fact believed that Section 2201(v) requires DOE to impose enrichment restrictions whenever the domestic uranium industry is not viable (see, *e.g.*, Resp. Br. 30 (quoting remarks of Rep. Lujan, one sponsor of the Conference Committee proposal that was rejected on the House floor)). Little can be learned about the meaning of a statute enacted in 1964, however, from beliefs expressed in 1982 by individual legislators whose proposals were mainly not adopted (see Gov't Br. 35-36 (rejection of both initial Senate bill and subsequent Conference Committee proposal)). By contrast, Congress's refusal (see *ibid.*) to pass measures that would automatically protect the domestic uranium industry from imports suggests that Congress as a whole understood that the domestic industry's problems stem from causes far more fundamental than foreign competition.

4. Respondents suggest (Br. 33-37) that DOE's interpretation of Section 2201(v) does not deserve the deference this Court ordinarily accords an agency's reading of its statute (see *Young* v. *Community Nutrition Inst.*, 476 U.S. 974 (1986)). Their arguments on this point are not persuasive.[6]

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[6] Respondents also assert (Br. 36) that DOE's interpretation of Section 2201(v) deserves no deference because of a continuing resolution which states that "no provision of this joint resolution or the July 24, 1986, criteria [in which DOE declined to adopt enrichment restrictions and explained its rationale for doing so] shall affect the merits of the legal position of any of the parties concerning the question[] whether section 161(v) of the Atomic Energy Act requires restriction of enrichment of foreign-origin source material destined for use in domestic utilization facilities * * *." Act of Oct. 18, 1986, Pub. L. No. 99-500, § 305, 100 Stat. 1783-210. As we have explained (Reply Memo. 5-6; Br. 15 n.12), we do not argue that the rulemaking affects the merits of this case. We have referred to the rulemaking because it sets out the Secretary's views on the legal and factual questions relevant here.

a. Initially, respondents (Br. 5-7, 34) and amici (see, *e.g.*, Senators Amici Br. 2-3) maintain that DOE's interpretation of Section 2201(v) should not receive deference because DOE has changed its position on the provision's meaning. But DOE's understanding of Section 2201(v) has not changed over time. What has changed are the facts, including the domestic industry's viability and the effects enrichment restrictions would have on its viability. Neither the AEC nor DOE has ever endorsed the court of appeals' interpretation of Section 2201(v), which would require that restrictions be imposed whenever the domestic industry is not viable, whatever might be the effects of restrictions on viability.

In fact, the statements on which respondents rely all reflect the understanding that Section 2201(v) applies only when there is a causal connection between uranium imports or DOE's enrichment of uranium imports and the viability of the domestic uranium industry. For example, in 1974, in explaining the AEC's decision to phase out its enrichment restrictions, Commissioner Anders (see Resp. Br. 6 (footnote omitted)) stated that "[s]hould there be any indication that the proposed schedule [permitting increased enrichment of foreign uranium] is endangering domestic industry viability, U.S. self-sufficiency, or our national

security, the [AEC] will reimpose restrictions or take such other steps as might be appropriate." *Proposed Modification of Restrictions on Enrichment of Foreign Uranium for Domestic Use: Hearings Before the Joint Committee on Atomic Energy*, 93d Cong., 2d Sess. 6 (1974) [hereinafter *1974 Hearings*]. In other words, Commissioner Anders recognized that if DOE's enrichment activities led to an increased use of foreign uranium that threatened the domestic industry, restrictions would be reimposed. He did not suggest that restrictions would automatically be reimposed if the domestic industry became non-viable for reasons unrelated to imports, or because of imports of uranium that would not be affected by enrichment restrictions.

At the same hearings, George Quinn, the AEC's Assistant General Manager for Production and Management of Nuclear Materials, explained (*1974 Hearings* 135 (emphasis added)) that during and after the phase-out the Commission would "monitor the extent of importation of foreign uranium for domestic use and *its effect on the viability of the domestic uranium producing industry*"; he likewise stated (*id.* at 134 (emphasis added)) that the Commission would be ready "to take any appropriate action if it appears [to be] *necessary to preserve the viability of the [domestic] industry*." Again, these statements make it plain that Section 2201(v) mandates an inquiry into the causes and possible cures of the domestic industry's problems, not the unthinking imposition of restrictions without regard to their effects.

Similarly, when the then-Assistant Secretary of Energy for Nuclear Energy testified in 1981 that the difficulties of the domestic uranium industry did not call for a reconsideration of the phase-out of enrichment restrictions, he explained that lack of demand, not imported uranium,

was the cause of the domestic industry's depressed state. See *Status of the Domestic Uranium Mining and Milling Industry: The Effects of Imports: Hearings Before the Subcomm. on Energy Research and Development of the Senate Comm. on Energy and Natural Resources*, 97th Cong., 1st Sess. 13 (1981) (statement of Shelby Brewer, Assistant Secretary of Energy for Nuclear Energy).[7] Like Commissioner Anders and Mr. Quinn, Assistant Secretary Brewer emphasized (*ibid.*) the importance of analyzing the effects of restrictions on viability.

In short, none of the statements cited by respondents ignored the need for a causal connection between enrichment restrictions and viability, or suggested that restrictions should be imposed even if they would not assure a viable domestic industry. These statements in no way support the court of appeals' reading of Section 2201(v).

b. Respondents also seek to distinguish this case from *Young* by arguing (Br. 34) that in *Young* the FDA had two methods of achieving the statutory purpose, while in this case Congress has prescribed only one way of achieving the statute's stated goal.

This attempted distinction is without substance. First, *Young* made it clear that the legal question involved was the deference to be paid to an agency's interpretation of an ambiguous statute (see 476 U.S. at 981 ("[t]he FDA has therefore advanced an interpretation of an ambiguous statutory provision")). Significantly, respondents have conceded (Br. 34) that in Section 2201(v) the phrase "to the extent necessary" modifies the phrase "shall not offer such [enrichment] services." Accordingly, the syntactical ambiguity identified in *Young* is not even present in this case:

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[7] Respondents' insinuation (see Br. 8) that the "economic disaster" in the domestic industry resulted from DOE's failure to re-impose restrictions under Section 2201(v) is thus without foundation.

it is undisputed that the critical phrase "to the extent necessary to assure the maintenance of a viable domestic uranium industry" qualifies DOE's mandatory duty to restrict enrichment services.

Faced with the clear holding of *Young*—that agency readings of ambiguous texts deserve deference—respondents (see Br. 33-34) simply attempt to distinguish this case on its facts. But there is nothing in the Court's opinion in *Young* to suggest that it applies to cases in which the interpretive question involves two ways to reach the statutory goal, but not to cases in which the goal cannot be achieved. *Young* stands for the principle that reasonable agency interpretations should receive deference. As we have explained, DOE's interpretation of Section 2201(v) is an eminently reasonable explication of both the text of the provision—which refers to the goal of viability—and of its underlying rationale. To read *Young* as giving deference to reasonable agency interpretations only if they happen to fulfill the statutory purpose in particular ways is to narrow that case's holding to its facts.[8]

[8] Respondents have not addressed any arguments concerning the General Agreement on Tariffs and Trade (GATT), Jan. 3, 1947, pts. 5, 6, 61 Stat. A3, T.I.A.S. No. 1700, asserting (Br. 37 n.44) that the GATT issue was not fairly presented in the petition. Certain amici, however, have discussed GATT in considerable detail (see Gov't of Australia Br.; Gov't of Canada Br.).

This case involves the meaning of 42 U.S.C. 2201(v), and does not call for an adjudication of the United States' obligations under GATT. This does not mean, however, that it would be improper for the Court to consider the role of trade policy in ascertaining the congressional intent underlying Section 2201(v). As amici have noted (see, *e.g.*, Gov't of Canada Br. 11-13), Congress, when it adopted the Private Ownership Act, was concerned with the effects of enrichment restrictions on United States international trade relations (see *Private Ownership Act Report* 17 (Section 2201(v) not inconsistent with GATT)). It might be appropriate to infer therefore that Congress would have been reluctant to require enrichment restrictions that would not make the domestic industry viable, thereby incurring the cost of offense to our trading partners without any benefit to the national interest. Similarly, it might be reasonable to infer that Congress resisted the suggestion that the AEC be required to restrict imports of enriched uranium in order to assure domestic viability (see page 7, *supra*) at least in part in order to minimize disruptions of our trade relations. Any such argument concerning the meaning of Section 2201(v) would, we believe, be properly encompassed within the question raised in the petition.

For these reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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• The Solicitor General is disqualified in this case.

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